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29 *Attorneys for Defendant: Otto Trucking LLC*

30 **UNITED STATES DISTRICT COURT**
31 **NORTHERN DISTRICT OF CALIFORNIA**
32 **SAN FRANCISCO DIVISION**

33 WAYMO LLC,

34 Case No. 3:17-cv-00939-WHA

35 Plaintiff,

36 **DEFENDANT OTTO TRUCKING'S**
37 **OPPOSITION TO PLAINTIFF WAYMO**
38 **LLC'S MOTION *IN LIMINE* NO. 16**

39 v.

40 UBER TECHNOLOGIES, INC.,
41 OTTOMOTTO LLC; OTTO TRUCKING
42 LLC,

43 Hearing Date: September 20, 2017
44 Hearing Time: 8:00 a.m.
45 Courtroom: 8 (19th Floor)
46 Judge: The Honorable William Alsup

47 Defendants.

48 Trial: October 10, 2017

49 Filed/Lodged Concurrently with:

1. Chatterjee Declaration
2. Gruver Declaration

50 **REDACTED VERSION OF DOCUMENT**
51 **SOUGHT TO BE SEALED**

1 Plaintiff Waymo, LLC (“Waymo”) seeks to preclude defendants from putting on testimony
 2 from one of its own former employees regarding its public disclosure of Waymo’s purported trade
 3 secrets. Leaving aside the undisputed record that defendant Otto Trucking LLC (“Otto Trucking”)
 4 disclosed Ms. Seval Oz and the earrings made from printed circuit boards during fact discovery,
 5 Waymo should have disclosed this information itself. Otto Trucking respectfully requests that
 6 Waymo’s Motion *In Limine* No. 16 be denied.

7 **I. STATEMENT OF FACTS.**

8 Ms. Oz was an employee of Google’s Self-Driving Car Program (Project Chauffeur) from
 9 approximately March of 2011 through August of 2014. Declaration of Neel Chatterjee in Support
 10 of Opposition to Waymo’s Motion *in Limine* No. 16 (“Chatterjee Decl.”), Ex. 1. She currently
 11 works at Aurima, Inc., an artificial intelligence startup focused on autonomous vehicles, funded by
 12 Waymo’s parent company, Alphabet, through its venture fund, Gradient Ventures. *See id.*

13 The printed circuits boards that ultimately became Ms. Oz’s earrings were not stored in
 14 any locked or secured location, and were available in many places throughout Project Chauffeur’s
 15 offices. Declaration of Daniel Gruver, ¶ 5. Daniel Gruver, then-technical program manager on
 16 Project Chauffeur’s LiDAR team, had a number of printed circuit boards on his desk located in a
 17 common area accessible to other employees. *Id.* Mr. Gruver recalls that Ms. Oz had suggested
 18 that the boards could make good earrings. *Id.* at ¶ 7. He did not recall anyone at Project
 19 Chauffeur expressing concern about Ms. Oz receiving the printed circuit boards. *Id.* at ¶ 8.

20 At no point during discovery has Waymo disclosed Ms. Oz, or the more general practice at
 21 Google and Project Chauffeur of letting employees retain mementos that included its LiDAR
 22 systems. Indeed, in its responses to Defendants’ interrogatories, Waymo stated that it was not
 23 aware of any instances where its purported trade secrets were publicly or otherwise disclosed to
 24 third parties. Chatterjee Decl., Ex. 2 (Response to Interrogatory No. 6). While taking the
 25 depositions of several of its former employees, Waymo did not ask them about public disclosure
 26 of trade secrets aside from a few patents and publications.

27 Otto Trucking listed Ms. Oz as a person likely having discoverable information in its
 28 Initial Disclosures Pursuant to Fed. R. Civ. P. 26(a)(1), served on June 21, 2017. Ex. H to

1 Waymo's Motion *in Limine* No. 16 ("Waymo Ex.") at 21-22. At all times since then, Ms. Oz has
 2 been on Otto Trucking's witness list. Given the accelerated schedule in this case, on or about
 3 August 2, 2017, the Special Master requested that the parties pare down their lists of witnesses and
 4 eliminate anyone that they did not intend to rely on at trial. Ms. Oz remained on Otto Trucking's
 5 witness list, and counsel identified her as a third party who would need to be subpoenaed.
 6 Chatterjee Decl., Ex. 3 (H. Vu email to service lists, 8/10/17). At no point did Otto Trucking
 7 remove Ms. Oz from its witness lists, and at no point did Waymo attempt to subpoena Ms. Oz or
 8 further pursue her deposition. *See id.* at Ex. 4 (H. Vu email to service lists, 8/12/17).

9 In its interrogatory responses dated July 31, 2017, Otto Trucking expressly disclosed that
 10 [REDACTED]
 11 [REDACTED] Waymo Ex. F, at p. 4 (Objs. and
 12 Resp. to Waymo's Secondd Set Common Rogs). At least two witnesses mentioned or discussed
 13 Ms. Oz during their deposition testimony. Chatterjee Decl., Ex. 5 (Dep. of Michael Xing at 14:17-
 14 33:4); Ex. 6 (Dep. of Dmitri Dolgov at 44:1-45:9). Ms. Oz's earrings were produced and made
 15 available to Waymo's counsel at the deposition of Pierre-Yves Droz on August 22, 2017. *See Id.*
 16 at Ex. 7 (Dep. of Pierre-Yves Droz at 33:22-39:8). During that deposition, pictures of the earrings
 17 were taken and were included as exhibits to the transcript. Counsel for Otto Trucking has
 18 expressly stated that the earrings were available for inspection by Waymo. *Id.* at 39:5-10. Otto
 19 Trucking has not received any request to inspect the earrings.

20 In response to a request for communications with Ms. Oz, third-party Anthony
 21 Levandowski produced text messages with Ms. Oz on August 23, which reflected his
 22 conversations with Ms. Oz regarding the earrings. *See* Waymo Exs. B, C, D.

23 **II. ARGUMENT**

24 Waymo contends – without citing to any legal authority – that suspected involvement by
 25 Mr. Levandowski in locating Ms. Oz's earrings is somehow a basis for precluding this evidence.
 26 This amounts to an absurdity – the mere suspicion that Mr. Levandowski provided information to
 27 counsel is not grounds for excluding evidence. Moreover, Waymo's contention that Mr.
 28 Levandowski has not cooperated in discovery is not correct, as he has produced documents

1 pursuant to subpoena, including in response to a request regarding Ms. Oz's earrings. In addition,
 2 Ms. Oz had discussed the earrings with others at Project Chauffeur. *See* Gruver Decl., ¶¶ 7-9.

3 To the extent that Waymo argues that any involvement by Mr. Levandowski risks a waiver
 4 of any party's privilege or his rights under the Fifth Amendment, the law is clear that a witness
 5 may "pick the point beyond which he will not go" and refuse to answer questions about matters
 6 already discussed. *See Shendal v. U.S.*, 312 F.2d 564, 566 (9th Cir. 1963); *In re Master Key Litig.*,
 7 507 F.2d 292, 293-94 (9th Cir. 1974) ("The proper inquiry in this case . . . is not whether [the
 8 witness] waived his privilege simply by giving incriminating testimony as to certain company
 9 practices, but whether, in light of his prior disclosures, the testimony sought could possibly
 10 incriminate him further."). Waymo had the opportunity to ask Mr. Levandowski about public
 11 disclosures and disclosures to third-parties of Waymo's alleged trade secrets, but it chose not to do
 12 so, either through a subpoena or at a deposition. Waymo cannot now use any purported
 13 involvement by Mr. Levandowski as a basis for excluding this evidence.

14 As to Waymo's objections under Fed. R. Civ. P. 26 and 37, Waymo's motion fails because
 15 the record shows that Otto Trucking disclosed Ms. Oz as a witness nearly two months before the
 16 close of discovery in its initial disclosures. *See* Fed. R. Civ. P. 37(c)(1); *see, e.g.*, *3Com Corp. v.*
 17 *Realtek Semiconductor Corp.*, No. C 03-2177 VRW, 2008 WL783383, at *5 (N.D. Cal. Mar. 24,
 18 2008) (denying motion where at least one document was produced before close of discovery and
 19 finding no prejudice as to the use of others at trial). She remained on Otto Trucking's disclosures
 20 even after the parties were asked to pare down their witness lists. As such, Waymo cannot now
 21 argue that it had no knowledge of her as a witness, or no reason to depose her.

22 None of the four factors identified by Waymo – (1) prejudice or surprise to the party
 23 against whom evidence is offered; (2) ability to cure any prejudice; (3) likelihood of disruption of
 24 trial; and (4) bad faith or willfulness – support excluding Ms. Oz's testimony or the earrings
 25 themselves. *See Lanard Toys Ltd. v. Novelty, Inc.*, 375 Fed. App'x 705, 713 (9th Cir. 2010).
 26 *First*, even assuming, *arguendo*, that disclosure of Ms. Oz and the PCB earrings was untimely,
 27 Waymo cannot argue prejudice because they were equally in possession of this information as
 28 defendants were. *See, e.g.*, *L&L Franchise, Inc. v. Tsai*, 2008 WL 11337594, at *2-3 (S.D. Cal.

1 Mar. 7, 2008) (denying motion to exclude where moving party knew of documents and documents
 2 were publicly available). Waymo cannot dispute that Ms. Oz was an employee at Waymo and
 3 Project Chauffeur. Waymo also cannot hide its head in the sand and pretend that it did not know
 4 of the practices at Project Chauffeur for departing employees to keep mementos, including parts of
 5 Waymo's LiDAR systems. Because such disclosures and information can constitute public
 6 disclosure of Waymo's purported trade secrets, Waymo should have disclosed this information
 7 itself during discovery. Second, Waymo had the opportunity to cure any prejudice that would
 8 have resulted, as it had the opportunity to depose or subpoena Ms. Oz and to inspect and
 9 photograph the earrings. That Waymo chose not to is no fault of Otto Trucking's. Third, Waymo
 10 halfheartedly argues that the earrings and Ms. Oz's testimony will "serve to disrupt trial" by
 11 introducing "outdated Waymo technology" that would be inadmissible under Fed. R. Evid. 403.
 12 The earrings and Ms. Oz's testimony are relevant to Waymo's public disclosure of its alleged
 13 trade secrets and the measures Waymo took to protect its alleged trade secrets. *See, e.g.*, Cal. Civ.
 14 Code § 3426.1(d)(2); *Townsend v. Akamai Techs., Inc.*, 2009 WL 10672745, at *2 (C.D. Cal. May
 15 14, 2009) (granting summary judgment and finding "Plaintiff has presented no evidence that he
 16 took reasonable steps" to maintain secrecy). The probative value of this evidence outweighs any
 17 potential undue prejudice to Waymo. *See* Fed. R. Evid. 403. Finally, Waymo admits that the
 18 Court need not consider the fourth factor, and as demonstrated above, Otto Trucking cannot be
 19 said to have abdicated its discovery duties by including a witness in its initial disclosures.

20 Waymo's meritless accusations appear to rest on the timing of the production of the
 21 earrings. The production, however, occurred before the close of discovery and before a large
 22 number of depositions took place. Given the compressed schedule in this litigation, all of the
 23 parties have been supplementing their productions through the close of discovery. For example,
 24 on the last day of fact discovery, Waymo produced over 7200 documents – about one-third of its
 25 total production, long after most depositions were completed. Waymo cannot be heard to
 26 complain about Otto Trucking's production – let alone seeking sanctions under Rule 37 – in light
 27 of their own repeated and belated supplementation of discovery.

28 For the above-stated reasons, Waymo's Motion *in Limine* No. 16 should be denied.

1 Dated: September 13, 2017

2 Respectfully submitted,

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Hayes P. Hyde

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